Supreme Court, U.S.
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No. 03-585

In The Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

Petitioner,

v.

WILLIAM McEUIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should address constitutional arguments raised by a party for the first time in its petition for certiorari.

2. Whether a trial court should have discretion under Fed. R. Evid. 403 to limit the manner of presenting certain evidence, some of which involves expert opinions, so as to reduce the likelihood that the evidence will be improperly used by the jury for an impermissible purpose.

3. Whether the standard by which courts assess the sufficiency of evidence to submit the question of punitive damages liability to the jury should be made more strict than the well-established standard that applies to other questions involving the sufficiency of a party's evidence.

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BRIEF FOR RESPONDENT IN OPPOSITION

In this product liability action, defendant Crown approaches this Court with arguments it never made before the courts below: arguments for a categorical limitation on trial court discretion over admission of evidence, and for a more stringent scrutiny of a motion for judgment as a matter of law than is afforded by the prevailing *de novo* appellate review. Its petition should be rejected.

STATEMENT OF THE CASE*

In a customary forklift maneuver, plaintiff drove a Crown forklift across a warehouse in a forks-trailing *(i.e.,* reverse) direction, with a load of bakery racks on the forks. Plaintiff thought he heard the load shift, leaned forward and to the right to check the load's stability, and in an involuntary response to maintain his balance,[1] extended his left leg outside the unguarded opening in the rear of the operator compartment. At that moment, the forklift collided with a steel post, crushing plaintiff's left foot.

Plaintiff contended that Crown's forklift was defective and unreasonably dangerous because of a design that

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* Record references are to the Excerpt of Record (ER) or Supplemental Excerpt of Record (SER) filed by the parties in the Ninth Circuit.

[1] Dr. Gerald Harris, a biomechanical engineer (*see* SER 11-22 and 653 for a summary of his qualifications), testified: "That's – an involuntary movement. That's a normal postural stability movement. That's the kind of movement that you'd produce to maintain your posture." SER 46-7. Another expert agreed: you cannot train someone not to do an involuntary act. SER 219.

failed to provide the operator with the proper protection, or, alternatively, because of an inadequate warning.[2] A forklift colliding with a wall or post at 1/2 mph will crush or amputate a foot trapped between the surfaces. SER 118, 536. The solution was the simple expedient of a door which would enclose the operator compartment. SER 148. Crown acknowledged that it had built hundreds of forklifts with doors, none of which had caused serious injury to an operator; that a door on a forklift is economical, safe, and complies with all OSHA and ANSI standards; and that Crown's competitors offer doors as a special order item or optional equipment. SER 147, 149, 154-55, 157-58, 194, 321-22, 326. Crown conceded that more than 310 operators had their left foot crushed in an accident similar to plaintiff's, on forklifts that lacked doors. SER 564, 569-601. These injuries constituted more than 85% of the major injuries reported from collisions, tipovers, and off-dock accidents involving Crown forklifts. *Id.* Plaintiff presented extensive evidence that doors are effective in reducing injuries.

All experts for both parties agreed: with a door on the Crown forklift, William McEuin would not have been injured.[3] The parties disagreed as to whether a door would

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[2] The jury determined that the warning was adequate, but that the forklift was defective and unreasonably dangerous in its design. ER 597-99.

[3] SER 517 (defendant's expert Johnson); SER 327-8 (Crown's product safety engineer Dunlap); SER 518-19 (defendant's expert Kazarian); SER 156 (plaintiff's expert Sevart); SER 54 (plaintiff's expert Harris); SER 309 (plaintiff's expert Fries). On the record of this case, this may be the only good example of truly uncontradicted testimony.

be an overall benefit or would, on the other hand, increase the severity of injuries from tipovers or off-dock incidents; they disagreed about the proper interpretation of Crown's accident data; they disagreed about what role the operators themselves played in these accidents; they disagreed, in other words, as to virtually every other aspect of plaintiff's claims. On all these contested issues, both parties presented evidence. ANSI standards, said Crown, did not require doors; plaintiff's riposte was that neither did the ANSI standards forbid them. ER 367; SER 325. Crown agreed that the forklifts it supplied *with* doors did meet ANSI standards. SER 313, 325. OSHA standards did not prohibit doors on forklifts, nor did it require them. SER 194, 217.

Plaintiff's evidence in support of his claim for punitive damages begins with lies. Perry, the facilities and equipment manager for one arm (Price) of what eventually became plaintiff's employer (Price/Costco), wanted doors on forklifts; Crown told him that ANSI standards prohibited doors (they didn't), and had caused the death of two forklift operators (they hadn't). In correspondence during the following year, Crown continued to misrepresent to Price that doors had killed operators, and in fact took the unsupported (and unsupportable) position that a foot crush injury suffered by a Price employee would have been much worse or even fatal if the forklift had a door.

Perry also testified that Crown representatives told him that the addition of doors "might make it appear as if previously-manufactured lifts had been deficient, that they were unsafe, and, therefore, they had to put a door on them." SER 237. This, Crown said, might expose them to litigation problems by suggesting that the previously manufactured forklifts were unsafe. SER 232-33, 235, 237.

At trial, Crown proffered testimony which the jury could find false. Crown testified that accidents occurred in circumstances clearly refuted by Crown's accident reports, and to injuries that didn't exist. SER 71; 345-46; 437-41; 458-92; 504-6. Crown's employees testified that they were instructed to tell plaintiff's employer that two operators had been crushed to death by doors; Crown denied issuing any such instruction. SER 496-501. Crown had repeatedly made similar misrepresentations and inconsistent statements, in this and other litigation;[4] Crown had made these same misrepresentations to other customers than Price/Costco. SER 321-22, 395, 415-17.

Crown's product safety engineer testified that no number of leg crush injuries would persuade him that Crown should offer doors for its standup riders. SER 514-15. Given the evidence, a jury could find this position a classic exercise in either blindness or obstinacy. A jury could also find that defendant's attitude was an example of "conscious indifference" of a known risk. ORS 18.537(1).[5]

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[4] For instance, in February 1998 Crown reported there had been 3 serious injuries to operators who stayed with the forklift during a tipover; in February 1999 Crown reported six. In March 1999 Crown again reported 3; at the trial of this case Crown first claimed 6 and then 4. SER 344, 357, 358-59, 437. In fact, Crown's accident history reflected, at most, one serious injury to an operator who stayed with the forklift during a tipover, and because of inconsistent reporting a jury could have concluded that not even this one existed. SER 71, 352-55, 565, 585, 588.

[5] ORS § 18.537(1) permits an award of punitive damages when "it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of

(Continued on following page)

This is the evidence which Crown repeatedly characterizes, before this Court, as "unsupported arguments of counsel and irrelevant and speculative hearsay." Petition at 4, 26-30.

The jury returned a verdict for plaintiff for $1,224,503.85 in compensatory damages (subsequently reduced by 50% for plaintiff's contributory fault) and $1,250,000 in punitive damages.

On appeal, Crown presented two issues: (1) whether it was an abuse of discretion to limit the form in which evidence relevant to state of mind was presented (referring to the court's ruling limiting evidence of the military specifications which Crown stated it had considered in its original design process in the late 1960s, and limiting the form in which Crown could present evidence that it had relied on the opinions of consultants in determining not to add a door to the forklift); and (2) whether the district court had erred when it denied Crown's motion for judgment as a matter of law on punitive liability.

In its appeal to the Ninth Circuit, Crown did not suggest that these issues had constitutional import. More specifically, Crown did not argue that the Fourteenth Amendment or this court's precedents mandated a closer scrutiny of the rulings to which it assigned error than was provided by the customary standard of review.

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harm and has acted with a conscious indifference to the health, safety and welfare of others."

REASONS FOR DENYING THE PETITION

I. Introduction and Summary

Crown presents no issue of any substance, much less a constitutionally significant one that was properly preserved. In fact, Crown seeks review of fact-specific rulings by the Ninth Circuit and the trial court. Its request should be denied.

In an effort to attract this Court's attention, the defendant attempts for the first time in this appeal to parlay a trial court's discretionary evidentiary ruling, and a fact-sensitive ruling on a routine motion for judgment as a matter of law, into a proposition that such decisions in punitive damages cases have constitutional import, and require a "heightened scrutiny."

Crown urges the adoption of an interpretation of Fed. R. Evid. 403 that would severely limit a trial court's ability to exclude evidence that has any relevance to a defendant's state of mind. Crown articulates a concept of a judge as "gatekeeper" which, instead of relying on a judge's discretion to foreclose testimony where appropriate (*Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), completely removes that discretion for a particular kind of evidence offered by a particular party – exculpatory evidence presented by a defendant in a punitive damages case – even when it is presented in the form of an expert opinion.

As to the sufficiency of the evidence to create a jury question on punitive damage liability, Crown does little more than reiterate its desire for an "exacting scrutiny" or "heightened review" (phrases it repeats seventeen times in its 30-page brief). What it does not, and cannot, do is tell

this Court what precedents would support or policies would be advanced by this adjustment to the familiar appellate process and the accepted standard for reviewing these questions.

II. Crown did not present to the courts below the issues it raises in this Court.

Crown barely raised constitutional questions after trial. In the midst of its argument that there was insufficient evidence to justify submitting the question of punitive liability to the jury, Crown inserted a single summary reference to *BMW of North America, Inc., v. Gore*, 517 U.S. 559 (1996) contending without elaboration that the award was excessive and "should be substantially reduced" *See* ER 624-25. Crown's primary focus was its assertion that the evidence did not meet Oregon's statutory standards for an award of punitive damages, and Crown suggested that the *BMW* factors should be considered "in determining whether there was sufficient evidence to support an award of punitive damages in any amount" (ER 625) – *i.e.*, apparently as a gloss on the usual standard for a judgment as a matter of law. No such contention was repeated in the Ninth Circuit.[6]

[6] In Crown's briefs to the Ninth Circuit, there was no mention of the Fourteenth Amendment, and no citation of this Court's opinions analyzing due process limitations on the amount of a punitive damages award. *BMW, supra; Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 403 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Even in its motion for rehearing, Crown never contended that the Fourteenth Amendment demanded a different standard of review, particular to punitive damages case, of evidentiary issues or motions for judgment as a matter of law; or that Fed. R. Evid. 403 should be applied differently when the defendant in a punitive damages case proffers exculpatory evidence. The only time such an argument surfaced in the Court of Appeals was when *amici curiae,* appearing for the first time in support of Crown's petition for a rehearing or rehearing *en banc,* argued that due process concerns mandated admissibility.[7] In the Ninth Circuit, Crown accepted that its evidentiary assignment should be reviewed "for abuse of discretion,"[8] a standard of review repeatedly reiterated by this Court. *See* discussion in the next section of this brief. Yet Crown now argues that the constitution requires a categorical rule which would eliminate trial court discretion and prohibit an evaluation of potential prejudice whenever a defendant offers what it claims is exculpatory evidence in defense of punitive liability.

Not until its petition for certiorari did Crown – or even the *amicus curiae* who appeared belatedly in the Court of Appeals – argue that a trial court's denial of a defendant's challenge to the sufficiency of evidence in support of punitive liability had constitutional implications, or required a more "exacting" appellate review than

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[7] Brief of Amici Curiae American Insurance Association *et al.* Not even in this brief was it argued that due process requires a categorical rule of admissibility, or an interpretation which eliminates trial court discretion.

[8] Brief of Defendants-Appellants at 28.

the familiar *de novo* review of motions for judgment as a matter of law.

Crown's failure to address these issues below forecloses the arguments it makes to this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

III. The district court reached an appropriate accommodation between Crown's interests and the prejudice to plaintiff of allowing expert opinions to be presented without an opportunity to examine the witness.

Contrary to Crown's assertions, the district court did not prevent Crown from presenting evidence that it had relied on military specifications when it originally designed the forklift, or that it relied on reports by consultants when it decided to prescribe guidelines for the use of this information. The court did not "wield its power to disable Crown from defending itself." Petition at 24.

Crown complained on appeal that it should have been allowed to introduce copies of the military specifications for forklift purchases by the Department of Defense, dating from 1964 to 1996. Exhibits 1049 through 1052, ER 291 through 319. The primary argument in support of admission of these specifications was Crown's contention that they had played a part in the original design of the forklift in the late 1960s. SER 526. The trial court allowed Crown's designer to testify that the forklift was designed to comply with the military specifications. ER 210. Crown offered no explanation why Defense Department specifications would have anything to do with a forklift purchased and used by a private corporation in its non-military business, nor did it explain why the later specifications

were relevant at all. Even the dissenter in the Court of Appeals "readily agreed" that these specifications were properly excluded (Petition at 19a) and Crown makes no more convincing argument here than it did in the trial court for their relevance.

That leaves the question of Crown's attempt to introduce the written reports of experts whom it had consulted but whom it did not call to testify. To this day, Crown asserts that there was no basis under any circumstances for excluding these reports, even if they had been offered on the issue of product defect, where they were clearly hearsay. The Court of Appeals noted the same refusal to acknowledge the factors which weighed against admissibility. Petition at 12a.

The district court *allowed* Crown to present the following evidence:

1. That Crown relied on the military specifications when it initially designed the forklift. ER 210.

2. That Crown consulted experts, their identity and their qualifications. *See, e.g.,* ER 218-19.

3. What the experts were asked to do (*i.e.,* analyze Crown's accident data). *Id.*

4. That the consultants made recommendations regarding the addition of doors to the forklift. *Id.*

5. That Crown relied on and followed these recommendations when making its decision not to incorporate a door. *Id.*

All this evidence went to the jury. And Crown availed itself of other routes to present similar evidence:

1. Crown could, and did, present evidence as to why it thought doors were dangerous. This was the focal point of Crown's defense. ER 207-209.

2. Crown could, and did, relate the results of any of its investigations into accidents. ER 233-36.

3. Crown could, and did, describe the testing in which Crown participated and report the results. ER 223-25; SER 315-20.

Finally, of course, if Crown wished to present in greater detail and explore the substance of its consultants' opinions, it could have avoided the entire hearsay problem by designating the consultants as expert witnesses, asking them to testify, and permitting plaintiff to cross-examine them.

Fed. R. Evid. 403 provides that evidence, even where relevant,

> may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This Court has long held that a ruling which strikes a balance between these countervailing poles is within the discretion of the trial court and is reviewed for abuse of discretion. *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879). More recently, in *U.S. v. Abel,* 469 U.S. 45, 54-55 (1984), this Court held that

> a district court is accorded a wide discretion in determining the admissibility of evidence under

> the Federal Rules. Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403[.]

Thus this Court affirmed the district court's decision limiting or "redacting" the form of evidence to avoid undue prejudice, and rejected a challenge to its admission: "These precautions did not prevent all prejudice to respondent * * * , but they did, in our opinion, ensure that the admission of this highly probative evidence did not unduly prejudice respondent." *Id.; see also Old Chief v. U.S.*, 519 U.S. 172, 192 n. 10 (1997) (holding that where the defendant offered to stipulate to a prior conviction, evidence of it should have been ruled inadmissible even where it was an element of the crime charged; but suggesting that a redacted record of a prior conviction could be an appropriate compromise under such circumstances). In *General Electric Co. v. Joiner*, 522 U.S. 136, 141-42 (1997) this Court reiterated those propositions:

> We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. [Cites to *U.S. v. Abel, supra,* and *Old Chief, supra*, omitted.] Indeed, our cases on the subject go back as far as *Spring Co. v. Edgar,* 99 U.S. 645, 658, 25 L. Ed. 487 (1879) where we said that "cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous."

In *Old Chief, supra*, 519 U.S. at 184, this Court emphasized that probative value must be assessed by comparing the proffered evidence with other evidentiary alternatives than the one proffered:

> The Notes to Rule 403 then take up the point by stating that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor." Advisory Committee's Notes on Fed. Rule Evid. 403. The point gets a reprise in the Notes to Rule 404(b), dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character: "**No mechanical solution is offered.** The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under 403." Advisory Committee's Notes on Fed. Rule Evid. 404. (Emphasis added).

But Crown urges exactly what *Old Chief*, and the rule-makers, rejected – the kind of "mechanical" application which eliminates any role for discretion:

> Crown maintains that courts cannot use Rule 403 to exclude relevant state-of-mind evidence.

Petition at 6.

> There is no doubt that the state-of-mind evidence offered by Crown * * * was relevant and highly probative. The analysis should have stopped there. Rule 403 should never be applied to exclude such evidence.

Petition at 13.

Indeed, *Old Chief* spoke directly to Crown's proposition that state-of-mind evidence can only be rejected if it is "cumulative:"

> That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

519 U.S. at 183-84.

In the same term as the opinion in *Old Chief*, the Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993), establishing a standard of evidentiary reliability as a precondition to the admissibility of expert opinion. The Court advised trial courts to utilize a "flexible inquiry" under the evidentiary rules to screen such opinions, emphasizing "vigorous cross-examination" as a "traditional and appropriate means of attacking shaky but admissible" expert opinions. 509 U.S. at 596. And although the "primary locus" of a trial court's "gatekeeping" obligation is Rule 702, this Court noted also the role of Rule 403:

> Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . " Judge Weinstein has explained: "Expert evidence can be both powerful and quite

> misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Weinstein,* 138 F.R.D. at 632.

509 U.S. at 595.

See also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (the trial court must have considerable leeway in deciding whether the proffered opinion is reliable and the same degree of latitude in deciding how to test its reliability). Thus, even if it were true, as Crown asserts, that courts should be especially wary of the exclusion of state-of-mind evidence, it is also true that courts have been advised to be wary of the effect of expert opinion on the jury, and the role of trial court discretion in handling expert opinions has been repeatedly emphasized.

Indeed, Crown's urgent request for a categorical, non-discretionary rule that mandates admission is particularly ironic – and inappropriate – in light of this Court's subsequent opinion in *General Electric v. Joiner, supra,* an opinion which undercuts Crown's argument for an "enhanced" standard of appellate review as much as it does Crown's expressed preference for bright-line rules and elimination of judicial discretion:

> Thus, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the "gatekeeper" role of the trial judge in screening such evidence. **A court of appeals applying "abuse of discretion" review to such rulings may not categorically distinguish between**

> **rulings allowing expert testimony and rulings which disallow it.**
>
> * * *
>
> In applying an overly "stringent" review to that ruling, [the court of appeals] failed to give the trial court the deference that is the hallmark of abuse of discretion review.

522 U.S. at 142-43 (emphasis added).

The categorical rule Crown seeks would have far-reaching collateral ramifications. If due process mandates admissibility of any evidence tending to be exculpatory of a wrongful state of mind in a civil trial for a civil penalty, then surely it would have the same effect in a criminal trial for a criminal penalty. The categorical rule Crown seeks would have a radical effect on a trial court's control over the evidence, and the manner of presenting that evidence, in any case where a defendant's state of mind is at issue.

In this case, balancing under Rule 403 worked as it was supposed to work. The trial court did not foreclose Crown from introducing evidence of its state of mind; but it did require Crown to present this evidence in a form that prevented the jury from directly hearing hearsay opinion evidence that was subject to no scrutiny by the trial court or cross-examination by plaintiff. Crown could and did present evidence that its decision not to put doors on its forklifts was reasonable; it could and did present evidence that its design decisions had been affected by military specifications; it could and did present evidence that it had made this choice to avoid increased risks in tip-over and off-dock accidents; it could and did present evidence that ANSI had rejected a recommendation that

doors be required; Crown's own accident data was before the jury, and Crown was able to refer to it to support (if it could) the representations it had made regarding the increased risks caused by doors; Crown could and did discuss any testing, performed in part by consultants, in which it had been involved; Crown could and did present expert testimony in defense of its choices; and Crown could have designated these consultants as expert witnesses and called them at trial, but chose not to. The trial court's decision not to admit the details of the expert opinions in the consultant's reports was eminently reasonable, in light of the evidence Crown was permitted to present and the other evidentiary options it had. There was simply no abuse of discretion here, and Crown's call for a categorical rule which eliminates trial court discretion is inconsistent with this Court's precedents and should be rejected.

Finally, the evidence which Crown insists was so critical essentially side-stepped the evidence plaintiff offered in support of punitive damages. *See* the discussion which follows in the next section. Plaintiff did not contend that Crown failed to take steps to discover the defect in its product; plaintiff contended that Crown repeatedly lied about the availability of doors, about whether doors would be consistent with ANSI and OSHA standards, about whether operators had died because of doors, about whether doors would reduce foot crush injuries. The fact that Crown consulted experts who recommended against doors did nothing to counter the evidence that Crown lied.

Crown's uphill battle to prove any prejudice, even if the district court had erred, was simply too steep.[9]

In summary, a trial court's discretion under Rule 403 works, and it worked in this case. The exercise of that discretion in this case has received thorough appellate review. There is no need to re-examine or to change well-established precedent to accommodate one litigant's disgruntlement with an appropriate exercise of discretion. That is particularly so because the categorical rule which

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[9] The Court of Appeals commented on the lack of prejudice to Crown:

> Even if the district court erred in excluding the independent engineer reports, Crown has failed to prove that it suffered prejudice. The jury received a substantial mount of evidence regarding the background information recommending a door that Crown relied upon when designing the forklift including ANSI standards, OSHA Regulations and Commentary, as well as testimony by Crown's designer Dunlap that he had consulted experts, received reports from them, and relied on their advice. The jury also heard testimony that an ANSI committee twice rejected a recommendation that doors become a requirement on standup forklifts. Although the excluded reports would have provided more evidence of the content of the materials Dunlap considered, the excluded evidence does not add anything to the background presented to the jury. Moreover, it is clear that the jury believed that Dunlap distorted data and other evidence for the purpose of limiting Crown's liability, including investigating tip-over and off-the-dock accidents while ignoring accidents such as McEuin's, although the latter were far more numerous. Expert reports commissioned by Crown and recommending against doors weighed against the distorted data likely would have done little to dissuade the jury from this belief. Therefore, we cannot conclude that excluding the engineer reports "more probably than not" tainted the jury's verdict.

Petition at 14a.

that litigant requests (for the first time in this Court) would necessarily have serious implications in other cases.

IV. Crown was not entitled to judgment as a matter of law on punitive liability, and there is no constitutional dimension to this issue.

Crown repeatedly asserts that the sufficiency of evidence to submit the issue of punitive liability to the jury must be subjected to "exacting scrutiny" – presumably a more rigorous standard than the *de-novo* review to which rulings on motions for judgment as a matter of law are usually subjected, and which the Court of Appeals provided in this case. Petition at 15a. This Court has made clear that a reviewing court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reese v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). As stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Thus, even though a reviewing court "should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reese, supra*, 530 U.S. at 151. As this Court stated almost sixty years ago in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944):

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Crown urges that an "exacting scrutiny" of the evidence in support of punitive liability is mandated by the 14th Amendment and this Court's precedents requiring a review of the *amount* of an award of punitive damages to ensure that it comports with due process. *See, e.g., State Farm Mut. Automobile Ins. Co. v. Campbell*, 438 U.S. ___, 123 S. Ct. 1513 (2003); *BMW v. Gore, supra*. On appeal, Crown did not contend that the amount of the jury's award was unconstitutionally excessive, nor did Crown invoke any "heightened" standard of review. Furthermore, even where the amount of an award is an issue, and constitutional concerns are clearly implicated, this Court has prescribed the same *de novo* appellate review as was applied by the Court of Appeals to the liability issue in this case. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001), noting that the Court had already rejected the plea for a "heightened scrutiny" even where the *amount* of an award is in controversy. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993).

In fact, Crown's real exception is not to the standard of review but to the refusal of the courts below to adopt its approach to the evidence – an approach which characterizes plaintiff's evidence as "speculative" or mere "unsupported arguments," and which thus insists that the evidence must be construed, and its credibility assessed, in its favor.[10] Crown has repeatedly invited the reviewing courts, at all levels, to re-weigh the evidence and become a 13th juror, and its selective approach to the evidence was noted by both courts below. The Court of Appeals observed, "Crown attempts on appeal to have us view the evidence selectively and in its favor." Petition at 17a. The district court made a similar observation, and provided a succinct summary of the inferences which a jury could reasonably have drawn from the evidence before it:

> After construing the evidence in the light most favorable to plaintiff, however, it cannot be said that only one reasonable conclusion, one which is contrary to the jury's, is permitted. The evidence presented at trial, if viewed most favorably for plaintiff, suggested the following: Crown's forklifts were unreasonably dangerous; the explanations proffered by Crown for failing to put doors on the forklifts were specious; Crown's collection of information was skewed and/or misleading; Crown committed misrepresentations; and Crown stood to possibly profit from disregarding important safety concerns involving the addition of forklift doors. This evidence, when accepted and

[10] Crown even argues that "the jury should not have been permitted to consider" admitted testimony to which it assigned no error on appeal. Petition at 29.

> viewed from a perspective favoring plaintiff, was sufficient to support the jury's decision to award punitive damages. Defendants' contentions offer rational interpretations of other evidence, which suggest that it would have also been reasonable for the jury to deny an award of punitive damages to plaintiff. While this is true, the possibility of reasonable alternatives to a jury's verdict is insufficient to compel judgment as a matter of law.

Petition at 25a-26a.

This evidence, and more, is summarized above in plaintiff's statement of the case. The specter of inconsistent punitive damages awards, presented by Crown in its Petition at 21, is chimerical; it ignores the facts that Crown sold hundreds of forklifts with doors, as had other forklift manufacturers who routinely made them available, and that its own accident data proved that doors provided protection against injury.

The Court of Appeals applied the right standard and reached the right conclusion. Crown's search for a constitutional handle for its complaints should be rejected.

CONCLUSION

Crown's petition presents nothing for this Court's consideration, and it should be denied.

Respectfully submitted,

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